Supreme Court, U. S.
FILED
JUL 28 1980
MICHAEL RODAK, JR., CLERK

No. 79-2066

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1979

THE HONORABLE WILLIAM JOHN BEER, THOMAS PLUNKETT, BARRY YAKER, FRANCES R. AVADENKA, and WARREN NEWTON,

Appellants,

vs.

RICHARD AUSTIN, SECRETARY OF STATE OF THE STATE OF MICHIGAN; OAKLAND COUNTY BOARD OF ELECTION COMMISSIONERS and THE HONORABLE NORMAN R. BARNARD, LYNN D. ALLEN, and C. HUGH DOHANEY, as Members thereof; MICHIGAN STATE BOARD OF CANVASSERS and BERNARD J. APOL, NANCY CHASE, JESSIE M. DILLARD, WALTER OLIVER, and WALLACE D. RILEY, as Members thereof; THE OAKLAND COUNTY BOARD OF CANVASSERS and BARBARA A. BRINKER, SARAH C. DICKSON, SANDRA KOKOTOVICH, PATRICIA A. SANDERSON, and LYNN D. ALLEN, as Members thereof; and BERNARD J. APOL, as Director, BOARD OF ELECTIONS,

Appellees.

On Appeal from the Supreme Court of the State of Michigan.

MOTION TO DISMISS OR AFFIRM

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PRINTED BY SPEAKER-HINES AND THOMAS, INC., LANSING, MICHIGAN—1980

QUESTIONS PRESENTED

I.

WHETHER THERE IS A LEGITIMATE STATE INTEREST IN MAINTAINING THE STANDARDS ARTICULATED IN ARTICLE 6, § 19, OF THE 1963 MICHIGAN CONSTITUTION, FOR MEMBERS OF THE STATE JUDICIARY.

II.

WHETHER SUCH STANDARDS WHICH PROHIBIT APPOINTMENT OR ELECTION TO THE JUDICIARY AFTER 70 YEARS OF AGE ARE VIOLATIVE OF EITHER DUE PROCESS OR EQUAL PROTECTION.

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Appellees.

On Appeal from the Supreme Court of the
State of Michigan.

MOTION TO DISMISS OR AFFIRM

The Appellees, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, respectfully move the Court to dismiss the appeal herein or, in the alternative, to

affirm the final judgment and decree of the Supreme Court of the State of Michigan on the ground that it is manifest that the questions on which the decision of the cause depends are so insubstantial as to warrant no further argument.

JUDGMENT BELOW

This lawsuit originated as a Mandamus action in the Michigan Court of Appeals. The Complaint for Mandamus was dismissed on May 9, 1980, and an Application for Leave to Appeal was filed in the Michigan Supreme Court. That Application was denied on June 19, 1980.

In effect, the Supreme Court of the State of Michigan upheld the validity of Article 6, § 19, of the Constitution of Michigan (1963), which provides that no person may be elected or appointed to a judicial office after reaching the age of 70 years. Both orders are attached to the Jurisdictional Statement.

JURISDICTION

A mandamus action was initiated in the Michigan Court of Appeals pursuant to 1963 Michigan General Court Rule 714 alleging that the due process and equal protection clauses of the United States Constitution would be violated if a judge were prohibited from seeking reelection because he had attained the age of seventy. The candidate argued that Article 6, § 19 of the 1963 Michigan Constitution and the enabling statutes should not be enforced.

The candidate was not successful and filed an Application for Leave to Appeal to the Michigan Supreme Court pursuant to 1963 Michigan General Court Rule 853. Leave to Appeal was denied.

A Jurisdictional Statement was filed in this Court on June 28, 1980. Jurisdiction was predicated on 28 USC 1275(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Michigan Constitution (1963), Article 6, § 19, provides:

> "The supreme court, the court of appeals, the circuit court, the probate court and other courts designated as such by the legislature shall be courts of record and each shall have a common seal. Justices and judges of courts of record must be persons who are licensed to practice law in this state. No person shall be elected or appointed to a judicial office after reaching the age of 70 years."

MCLA 168.411; MSA 6.1411 provides:

> "No person shall be eligible to the office of judge of the circuit court who is not a qualified elector of the judicial circuit in which election is sought, as provided in section 11 of article 6 of the state constitution, who is not licensed to practice law in this state and who at the time of election is 70 years of age or older."

MCLA 168.413a; MSA 6.1413(1) provides:

> "Any incumbent circuit court judge may become a candidate in the primary election for the office of which he is an incumbent by filing with the secretary of state an affidavit of candidacy not less than 120 days prior to the date of the primary election.
>
> "The affidavit of candidacy shall contain statements that the affiant is an incumbent circuit court judge for the circuit in which election is sought, that he is domiciled within the circuit, that he will not attain the age

of 70 by the date of election and a declaration that he is a candidate for election to the office of circuit court judge."

STATEMENT OF THE CASE

Appellant, William J. Beer, is a circuit judge in Oakland County, Michigan. Appellant Beer was first elected to that position in April, 1959 and has continually served until the present time. Judge Beer was last elected in November, 1974, to serve a six year term which will expire on December 31, 1980.

Appellant Beer attained 70 years of age on February 17, 1979. However, despite the state constitution and statutes, he sought to file affidavits as a candidate for reelection.

The Elections Division of the Michigan Department of State refused to accept the affidavits and notified Appellant Beer that he was prohibited from seeking reelection pursuant to Michigan Constitution 1963.

In consequence thereof an action for mandamus was brought in the Michigan Court of Appeals seeking to compel the state to place Appellant Beer's name on the ballot in the upcoming primary and general elections. The individual voter appellants in the original action alleged that the qualifications imposed upon the putative candidate violated their constitutional right to vote for the candidate of their choice.

On May 9, 1980, the Michigan Court of Appeals denied Appellant's Motion for an Order to Show Cause, specifically found a lack of merit in the grounds presented, and ordered that the complaint for mandamus be dismissed. A copy of the Court of Appeals order is contained in the appendix to Appellant's Jurisdictional Statement.

An appeal from that order was taken to the Supreme Court of the State of Michigan, and on June 19, 1980, the Supreme Court issued its order denying the Application for Leave to Appeal on the grounds that the court was not persuaded that the questions presented should be reviewed. A copy of the Supreme Court order is also contained in the appendix to Appellant's Jurisdictional Statement.

From that order of the Michigan Supreme Court, Appellants seek to have this Court note probable jurisdiction over the appeal, permit the filing of briefs, and set the matter for oral arguments.

THE QUESTIONS PRESENTED ARE INSUBSTANTIAL

I.

THERE IS A LEGITIMATE STATE INTEREST IN MAINTAINING THE STANDARDS ARTICULATED IN ARTICLE 6, § 19, OF THE MICHIGAN CONSTITUTION FOR MEMBERS OF THE STATE JUDICIARY.

In 1955, the Michigan Senate and House of Representatives proposed an amendment to Const 1908, art 7, § 17. The amendment was presented to the electorate in the form of 1955 PA J.R. 2, and added the following sentence to art 7, § 17, *supra*:

> "Justices of the supreme court and judges of all circuit courts in this state elected or appointed after July 1, 1955, shall at the time of such election or appointment be under 70 years of age and licensed to practice law in this state."

The amendment was ratified by the people on April 4, 1955, and, thus, became a part of the Michigan Constitution. The

people, by direct vote, expressed approval of the dual qualifications of being licensed to practice law and being less than 70 years of age as reasonable and desirable standards for state judicial officers.

At the Constitutional Convention of 1961, many of the provisions of Const 1908, art 7, § 17 were simply retained in the new document and specifically the maximum age limitation was again embodied as part of Const 1963, art 6, § 19.

The same qualifications were approved by the delegates to the Constitutional Convention of 1961. A study of the Official Record of the Convention reveals that although much debate was held on the question of requiring a license to practice law as a qualification for holding judicial office, there was very little discussion of the maximum age qualification.

It is important to note that although there is a paucity of language on the topic, that surely should not be taken as a lack of concern for the age requirement. The record shows that the Committee on the Judiciary proposed to the Convention that the language "shall not" be stricken from the sentence and the words "no person shall" inserted so that the sentence would read, "and no person shall be elected or appointed to a judicial office after reaching the age of 70 years."

In making that proposed amendment, which was adopted by the Constitution, Delegate Danhof stated:

> ". . . —Mr. Ford, the Vice-Chairman of my committee, and myself offer this amendment so as to make sure that the 70 year age requirement is maintained within the constitution.
>
> • • •
>
> "Mr. Rajkovich [delegate] stated it was not their intention to disturb this [age limit] . . ."

1 Official Record, Constitutional Convention 1961, p 1501

The legitimate state interest which the delegates were seeking to advance was an effective and efficient judicial system. The words of Delegate Everett explain their concerns in a most cogent fashion:

> "Let me say this. I would not suggest for a moment—and I don't think anybody here would suggest—that the framework is the total answer. Because a good system can produce bad judges, and a bad system can produce good judges. But, in the final analysis, the system if it is sound is much more likely to provide a good judiciary and a good judicial system for the people of the state than a bad one is."

1 Official Record, Constitutional Convention 1961, p 1482

By adopting the proposed Constitution in 1963, the voters directly approved for the second time the mandatory retirement age for judges.

In *Aronstam* v *Cashman*, 325 A2d 361 (Vt, 1974), the very same questions raised in this case were presented to the Vermont Supreme Court. There two assistant judges, and several of their constituents who stated that they would vote for the assistant judges if they were candidates, brought suit to compel certain county clerks to accept their nominating petitions for reelection. The clerks had refused because both judges were over 70 years of age and Vermont had a mandatory retirement age of 70 years.

The Court held that the mandatory retirement age of 70 years for assistant judges promoted the legitimate state interest of imposing the highest possible standards for the judiciary

and did not violate the plaintiffs' rights to equal protection of the law.

In reaching their conclusion, the Vermont Supreme Court was guided by the dual essential inquiry test outlined by Justice Powell in *Weber* v *AETNA Casualty and Surety Co,* 406 US 164; 92 S Ct 1400; 31 L Ed 2d 768 (1972):

1. What legitimate state interest does the classification promote?

2. What fundamental personal rights might the classification endanger?

The people of the State of Michigan, like the citizens of Vermont, have a legitimate state interest in requiring the highest possible standards for members of the judiciary by minimizing, as far as possible, the threat of an obviously disabled judge continuing to preside. In attempting to promote and further that interest, the people amended one Constitution to include the 70 year maximum age qualification for a judge and approved a subsequent Constitution containing the same proviso.

In addition, this is not the sole method utilized to insure that the highest possible standards are required of the Michigan judiciary. See, for example, the Michigan Code of Judicial Conduct which was adopted by the Michigan Supreme Court on October 1, 1974. The various canons of the Code of Judicial Conduct require that judges should, for instance, refrain from political activity which is inappropriate to their judicial office; regulate extrajudicial activities to minimize the risk of any conflict with judicial duties; and avoid appearances of impropriety in all activities.

The United States Court of Appeals for the Second Circuit was faced with the same question regarding the state's interest

in imposing age restrictions upon New York state judges. The Court determined that such restrictions were a matter for the legislative process of the state and held:

> "We do not deem age to be a suspect classification requiring any strict scrutiny of the state's scheme of age restrictions upon judicial terms of office. . . . *It would appear that without question the state could rationally determine that, in the interests of judicial efficiency and the encouragement of younger attorneys with judicial aspirations, a mandatory age limitation of 70 for inferior court judges was reasonable.*" (emphasis added)
>
> *Rubino* v *Ghezzi*, 512 F2d 431, 433 (CA 2, 1975), *cert den*, 423 US 891 (1975)

The weight of authority has established that mandatory age requirements for judicial officers meet many legitimate and valid state interests, and there is a rational relationship between a maximum age as one qualification for judicial office and the end sought to be accomplished.

II.

STANDARDS WHICH PROHIBIT APPOINTMENT OR ELECTION TO THE JUDICIARY AFTER 70 YEARS OF AGE DO NOT VIOLATE DUE PROCESS OR EQUAL PROTECTION.

This Court has developed a two-tiered approach to equal protection cases. If the interest is deemed to be "fundamental" or if the classification is "suspect," the Court will apply a "strict scrutiny" test which requires that the state display a "compelling interest" to support or justify the classification. Other legislative and constitutional provisions are subject to

review under the traditional equal protection test which requires only a showing of a "rational relationship" between the legislation and the end to be accomplished.

Since age is not a "suspect classification," *Manson* v *Edwards*, 482 F2d 1076 (CA 6, 1973), the "strict scrutiny" test is not applicable and the state is not required to show a "compelling interest" which justifies the classification. Rather, the constitutional provision setting the 70 year maximum age is subject only to the rational relationship test.

The traditional equal protection test in Michigan is set forth in *Naudzius* v *Lahr*, 253 Mich 216, 222, 223; 234 NW 581, 583 (1931), as follows:

> "'1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. *One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary.' Lindsley* v *Natural Carbonic Gas Co.*, 220 US 61, 78; 31 S Ct 337, 340; 55 L Ed 369, 377 (1911)." (emphasis added)

In *Massachusetts Board of Retirement* v *Murgia*, 427 US 307; 96 S Ct 2562; 49 L Ed 2d 520 (1976), this Court in a

per curiam opinion upheld the constitutionality of a Massachusetts statute which provided that members of the uniformed state police would be mandatorily retired at age 50. This Court found that the rational basis test was the proper standard by which the statute should be tested.

> "This Court's decisions give no support to the proposition that a right of governmental employment per se is fundamental. . . . Accordingly, *we have expressly stated that a standard less than strict scrutiny has consistently been applied to state legislation restricting the ability of employment opportunities.*" (emphasis added)
>
> *Massachusetts Board of Retirement* v *Murgia, supra,* 427 US at 313; 96 S Ct at 2566; 49 L Ed 2d at 524

Federal courts have uniformly upheld mandatory retirement statutes and constitutional provisions, see *Retail Clerks U, Local 770* v *Retail Clerks Int Ass'n,* 359 F Supp 1285 (CD Calif, 1973); *Lewis* v *Tucson School District No 1,* 23 Ariz App 154; 531 P2d 199 (1975); *Armstrong* v *Howell,* 371 F Supp 48 (DC Neb, 1974); *Weisbrod* v *Lynn,* 383 F Supp 933 (DC DC, 1974), *affg,* 420 US 940; 95 S Ct 1319; 43 L Ed 2d 420 (1975), *reh den,* 423 US 886; 96 S Ct 162; 46 L Ed 2d 118 (1975).

As recently as March, 1979, the United States Court of Appeals for the Seventh Circuit considered the question presented in this case. A judge facing a 70 year mandatory retirement age, along with several voter plaintiffs who claimed a denial of their right to vote for the candidate of their choice, brought suit to have the statute declared unconstitutional. In *Trafelet* v *Thompson,* 594 F2d 623, 627 (CA 7, 1979), *cert den,* . . . . US . . . .; 100 S Ct 219; 62 L Ed 2d 142 (1975), the Court said:

> "The equal protection clause does not prohibit the legislature from adopting a more rigorous policy for assur-

ing excellence in the judiciary than for other elective offices. As the Supreme Court said of the Foreign Service in *Vance* v. *Bradley, supra,* .... U. S. at ...., 99 S.Ct. at 956.

" 'The judgment that the Foreign Service needs such a system more than do many other departments is one of policy, and this kind of policy, under our constitutional system, ordinarily is to be "fixed only by the people acting through their elected representatives." '

"Citing *Fireman* v. *Chicago, R.I. & P.R. Co.,* 393 U.S. 129, 138, 89 S.Ct. 323, 21 L.Ed.2d 289 (1968)."

After further discussion of the merits of the case, the *Trafelet* Court detailed some of the authority supporting mandatory retirement ages:

"Our conclusion that mandatory retirement for judges at age 70 does not violate the equal protection clause is supported by the case law involving mandatory retirement of various kinds of governmental officers and employees. *Vance* v. *Bradley, supra,* .... U.S. ...., 99 S.Ct. 939, 59 L.Ed.2d 171; *Massachusetts Board of Retirement* v. *Murgia, supra,* 427 U.S. 307, 96 S.Ct. 2562, 49 L.Ed.2d 520; *Rubino* v. *Ghezzi,* 512 F.2d 431 (2d Cir.), *cert. denied,* 423 U.S. 891 96 S.Ct. 187, 46 L.Ed.2d 122 (1975); *Palmer* v. *Ticcione,* 576 F.2d 459 (2d Cir. 1978), *cert. denied,* .... U.S. ...., 99 S.Ct. 1421, 59 L.Ed.2d 633 (1971); *Johnson* v. *Lefkowitz,* 566 F.2d 866 (2d Cir. 1977); *Weisbrod* v. *Lynn,* 383 F.Supp. 933 (D.D.C. 1974), *aff'd summarily,* 420 U.S. 940, 95 S.Ct. 1319, 43 L.Ed.2d 420 (1975); *McIlvaine* v. *Pennsylvania State Police,* 454 Pa. 219, 309 A.2d 801 (1973), *appeal dismissed for want of substantial federal question,* 415 U.S. 986, 94 S.Ct. 1583, 39 L.Ed.2d 884 (1974)."

Trafelet, supra, 629

The Court of Appeals then reached the following decision regarding the claimed equal protection violation:

> "Having concluded that the classification adopted by the legislature is not suspect, does not impair fundamental rights, and is rationally related to a legitimate state purpose, and therefore satisfies the requirements of equal protection, we cannot find it unconstitutional as creating an irrebuttable presumption."
>
> *Trafelet, supra,* p 630

Appellants have not met the burden of proving that Michigan does not have a legitimate interest in requiring the standards set forth in the State Constitution for judicial officers.

Appellant Beer bases his due process claim on the "irrebuttable presumption doctrine," which was developed in a series of cases, *Stanley* v *Illinois,* 405 US 645; 92 S Ct 1208; 31 L Ed 2d 551 (1972); *Vlandis* v *Kline,* 412 US 441; 93 S Ct 2230; 37 L Ed 2d 63 (1973); and *Cleveland Board of Education* v *LaFleur,* 414 US 632; 74 S Ct 791; 31 L Ed 2d 52 (1974). While the validity of the doctrine is not questioned here, the scope of the doctrine and its application to a mandatory retirement age is questioned.

In *Weinberger* v *Salfi,* 422 US 749; 95 S Ct 2457; 45 L Ed 2d 522 (1975), this Court limited the doctrine by holding that the provisions of the Social Security Act precluding a wage earner's widow and stepchild from receiving social security benefits if there had not been a continuing relationship for 9 months prior to the wage earner's death was not an irrebuttable presumption.

This Court found that the rights involved in the trilogy of cases, *Stanley-LaFleur-Vlandis, supra,* were so fundamental

that any restrictions upon these rights would violate due process. *Weinberger, supra,* pp 771-773. In contrast, it was held in *Weinberger* that there was a "noncontractual claim to receive funds from the public treasury which enjoys no constitutionally protected status." *Weinberger, supra,* p 772.

The doctrine of irrebuttable presumption is limited by *Weinberger, supra,* to presumptions dealing with fundamental rights such as the right to conceive and raise children, *Stanley, supra,* and the right of freedom of choice in matters of marriage and family life, *LaFleur, supra.*

The rights involved in this lawsuit, the right to judicial and elected office, are not fundamental. In *Trafelet* v *Thompson, supra,* the Seventh Circuit Court of Appeals stated:

> "Neither the right of governmental employment, *Massachusetts Board of Retirement* v. *Murgia,* 427 U.S. 307, 313, 96 S.Ct. 2562, 49 L.Ed.2d 520 (1976), nor the right to run for elective office, *Bullock* v. *Carter,* 405 U.S. 134, 142-143, 92 S.Ct. 849, 31 L.Ed.2d 92 (1972), is fundamental. See J. Nowak, R. Rotunda, and J. N. Young, *Handbook on Constitutional Law* 686 and 643 (1978) and L. Tribe, *American Constitutional Law,* § 13-19 at 775-777 (1978). Judicial office is no exception. *Napolitano* v. *Ward,* 457 F.2d 279, 284 (7th Cir. 1972), *cert. denied,* 409 U.S. 1037, 92 S.Ct. 512, 34 L.Ed.2d 486 (1973)."

Therefore, the use of the doctrine of irrebuttable presumption would be inappropriate in this case because the rights involved are not fundamental.

Although this Court has not ruled directly on the subject of irrebuttable presumption as it relates to mandatory retirement, several federal cases have consistently decided the very same issue.

The United States Court of Appeals for the Sixth Circuit in *Talbot* v *Pyke*, 533 F2d 331, 333 (CA 6, 1976), dismissed the argument that a municipal park district's policy of mandatory retirement at age 70 denied the plaintiff due process because of an irrebuttable presumption based upon age. Citing *Weinberger, supra,* as authority, the Court stated that the doctrine was not applicable.

In *Trafelet, supra,* the Seventh Circuit Court of Appeals stated that the doctrine did not apply in the mandatory retirement scheme involved. Expressing concern with the validity of the doctrine coupled with the difficulty of application in an earlier opinion, *Miller* v *Carter*, 547 F2d 1314, 1316-1319 (CA 7, 1977), *aff'd*, 434 US 356; 98 S Ct 786; 54 L Ed 2d 603 (1978), the Court stated in *Trafelet, supra*:

> ". . . Since our decision in *Miller,* the Supreme Court has not relied upon the doctrine in any case, although the Court has had several opportunities to do so. *Vance* v. *Bradley, supra,* is the second mandatory retirement decision in which the Supreme Court has not referred to the irrebuttable presumption doctrine; even Justice Marshall, the lone dissenter, although specifically pointing out that the district court judgment invalidating the statute which the Court was reviewing could be sustained on any ground finding support in the record, did not mention the irrebuttable presumption doctrine. See also *Friedman* v. *Rogers*, ... U.S. ...., ... n.8, 99 S.Ct. 887, 893, 59 L.Ed.2d 100, 108 (1979); *First National Bank* v. *Bellotti*, 435 U.S. 765, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978); *Ohio Bureau of Employment Services* v. *Hodory*, 431 U.S. 471, 490 N.18, 97 S.Ct. 1898, 52 L.Ed. 2d 513 (1977); *Fiallo* v. *Bell*, 430 U.S. 787, 791, 97 S.Ct. 1473, 52 L.Ed.2d 50 (1977); *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 22-24, 96 S.Ct. 2882, 49 L.Ed.2d 752 (1976), *Cf. Elkins* v. *Moreno*, 435 U.S. 647, 98 S.Ct. 1338, 55 L.Ed.2d 614

(1978). See *DeLaurier* v. *San Diego Unified School District,* 588 F.2d 674 at 682-683 n.16 (9th Cir. 1978)."

Trafelet, supra, p 629

The *Trafelet* Court then dismissed the irrebuttable presumption based upon equal protection language.

In *Weisbrod* v *Lynn, supra,* the Court dismissed a suit by a federal employee claiming that 5 USC 8335 was unconstitutional because it mandated retirement at age 70. In dismissing the suit, the Court took particular note of *McIlvaine* v *Pennsylvania State Police, 6 Pa Commonwealth* 505; 296 A2d 630 (1972), *aff'd* 454 Pa 219; 309 A2d 801 (1973), *app dism'd,* 415 US 986; 94 S Ct 1583; 39 L Ed 2d 884 (1974), wherein a case with identical issues (mandatory retirement at age 60) was also dismissed for want of a substantial federal question. Most importantly, the district court noted that the "irrebuttable presumption argument" was made to, and rejected by, this Court in *McIlvaine, supra.* The district court in *Weisbrod, supra,* stated:

"This framing of the basic issue in *McIlvaine* convinces this Court that the Supreme Court was certainly not ignorant of the due process issue before it. Only two months prior to the *McIlvaine* decision, Justice Rehnquist had observed: " '[T]he Court will have to strain valiantly in order to avoid having today's opinion [relying primarily on the doctrine of irrebuttable presumption] lead to the invalidation of mandatory retirement statutes for governmental employees.' If the remaining Supreme Court Justices had agreed with Justice Rehnquist's conclusion, the Court would not have disposed on *McIlvaine* on the grounds that it failed to present a substantial federal question."

Weisbrod, supra, p 937

In *Rubino, supra,* the Court of Appeals for the Second Circuit upheld the constitutionality of mandatory retirement of state judges at age 70, affirmed an order denying a motion to convene a three judge district court, and dismissed the complaint. The Court cited *Weisbrod, supra,* and *McIlvaine, supra,* as a basis for its determination of an insubstantial federal question and determined that the due process and equal protection questions were substantially similar, if not identical.

The Second Circuit reaffirmed the holding of *Rubino, supra,* in *Palmer* v *Ticcione,* 576 F2d 459 (1978), *cert den,* 440 US 954; 99 S Ct 1421; 59 L Ed 2d 633 (1979), and dismissed a due process attack on the New York Compulsory Retirement System as creating an irrebuttable presumption. The Court stated:

> "We reach the same conclusion with regard to the due process attack on compulsory retirement as establishing an irrebuttable presumption. That claim is analytically very similar to the equal protection one. If the statutory classification is sustainable as rationally based, then it should not fall because it might also be labeled a presumption. Moreover, the due process claim was before the Court in *McIlvaine* v. *Pennsylvania,* 415 U.S. 986, 94 S.Ct. 1583, 39 L.Ed.2d 884 (1974), and *Weisbrod* v. *Lynn,* 420 U.S. 940, 95 S.Ct. 1319, 43 L.Ed.2d 420 (1975), *aff'g* 383 F.Supp. 933 (D.D.C. 1974), and this court in *Rubino* v. *Ghezzi,* 512 F.2d 431 (2d Cir.), *cert. denied,* 423 U.S. 891, 96 S.Ct. 187, 46 L.Ed.2d 122 (1975). In each case it was rejected."
>
> *Palmer* v *Ticcione, supra,* pp 463-464

On May 13, 1980, in *Malmed* v *Thornburg,* .... F2d .... (CA 3, 1980), Docket No. 79-2467, 48 LW 2767 (May 27, 1980), the United States Court of Appeals for the Third District reversed the finding of a district court that concluded

that a constitutionally mandated retirement age for judges was void as creating an irrebuttable presumption of incompetence based on age.

The Court of Appeals remanded the case with directions to enter judgment in favor of the appellants. Significantly, the Court stated that the important issue to be decided was:

> ". . . Is the mandatory retirement age rationally related to the accomplishment of *any* legitimate state objective?"
>
> *Malmed, supra,* p 29

The Court concluded that the constitutionally provided mandatory judicial retirement at age 70 was rationally related to a legitimate legislative objective.

> "In reviewing a state statute or constitutional provision under the due process or equal protection clause, a court must determine if the provision rationally furthers *any* legitimate state objective. 'For these purposes, it is, of course, constitutionally irrelevant whether this reasoning in fact underlay the legislative decision . . . .' *Flemming* v. *Nestor,* 363 U.S. 603, 612 (1960). The court may even hypothesize the motivations of the state legislature to find a legitimate objective promoted by the provision under attack. *See Weinberger* v. *Salfi,* 422 U.S. 749, 780 (1975); *Williamson* v. *Lee Optical Inc.,* 348 U.S. 483, 487-90 (1955); *Trafelet* v. *Thompson,* 594 F.2d 623, 626 (7th Cir.), *cert. denied,* .... U.S. ...., 48 U.S.L.W. 3239 (Oct. 1, 1979). The legitimate purpose justifying the provision need not be the primary purpose of the provision. *McGinnis* v. *Royster,* 410 U.S. 263, 276 (1973) . . . ."
>
> *Malmed, supra,* p 7

The Third Circuit found that the lower court had erroneously placed the burden of proof on the defendants to rebut the claim of a due process violation and held that the proper approach is to require the complaining party to show that the constitutional convention had no reasonable basis for believing in their reasons for the adoption of the mandatory retirement provisions.

The irrebuttable presumption argument was also raised in *Malmed*:

> "Thus, we do not read the irrebuttable presumption decisions as deviating substantially from the traditional tests for violations of the due process clause. Because no suspect class or fundamental interest is implicated in this case, we must apply the standard as explained in *Weinberger* v. *Salfi,* 422 U.S. at 777:
>
> "[T]he question raised is not whether a statutory provision precisely filters out those, and only those, who are in the factual position which generated the congressional concern reflected in the statute. Such a rule would ban all prophylatic provisions, and would be directly contrary to our holding in *Mourning* [v. *Family Publications Service, Inc.,* 411 U.S. 356 (1973)]. Nor is the question whether the provision filters out a substantial part of the class which caused congressional concern, or whether it filters out more members of the class than non-members. The question is whether Congress, its concern having been reasonably aroused by the possibility of an abuse which it legitimately desired to avoid, could rationally have concluded both that a particular limitation or qualification would protect against its occurrence, and that the expense and other difficulties of individual determinations justified the inherent imprecision of a prophylactic rule."
>
> *Malmed, supra,* p 21

The United States Court of Appeals for the Third Circuit has clearly, concisely, and effectively answered every question raised by plaintiffs-appellants in this case.

Finally, this Court, by a vote of 8-1, affirmed a three judge district court's ruling that upheld the constitutionality of a mandatory state retirement age of 65 for attorney-hearing examiners. *Slate* v *Noll,* 474 F Supp 882 (WD Wis, 1979), *aff'd,* .... US ....; 100 S Ct 655; 62 L Ed 2d 637 (1980).

The rulings enunciated by the Courts of Appeals in the Second, Third, Sixth, and Seventh Circuits, as well as the prior decisions of this Court, conclusively defeat the argument that either due process or equal protection violations have occurred.

CONCLUSION

WHEREFORE, Appellees respectfully submit that the Appellants present no substantial question for the decision of this Court, and pray that the appeal be dismissed or the judgment of the Michigan Supreme Court be affirmed.

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Dated: July 23, 1980